IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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Nos. 71-1017 and 71-1026

HON. MIKE GRAVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

[No. 71-1017]

UNITED STATES OF AMERICA,

Petitioner,

v.

HON. MIKE GRAVEL,

Respondent.

[No. 71-1026]

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF DR. LEONARD S. RODBERG AS *AMICUS CURIAE*

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Interest of *Amicus Curiae*[1]

This litigation began with Dr. Leonard S. Rodberg's motion to quash a subpoena which sought to compel his appearance before a grand jury in the District of Massachusetts. Subsequently, the government caused subpoenas to be served upon other persons whom it apparently sought to question about his and other persons' activities. Thus Dr. Rodberg has been drawn into this litigation both as a witness before the grand jury and as a subject of its inquiry. As the outcome of these cases will determine in large measure the protection to which he is entitled as a legislative aide of Senator Gravel with respect to the grand jury inquiry herein involved, Dr. Rodberg seeks to submit this *amicus* brief.[2]

Statement of the Case

Since June 29, 1971, Dr. Leonard S. Rodberg has been a legislative assistant to Mike Gravel, United States Senator from Alaska. On the evening of August 24, 1971, he was served at his home in Silver Springs, Maryland, with

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[1] Counsel for the government and for Senator Gravel have each agreed to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court.

[2] Technically, insofar as the government's appeal is an appeal from the protective order entered by the District Court, Dr. Rodberg is a party to this proceeding. (Had Senator Gravel not intervened, Dr. Rodberg would plainly have been the appellee in the case of the government's appeal from that protective order. The Senator's intervention does not affect Dr. Rodberg's status in this regard.) However, since the Senator has intervened and Dr. Rodberg is in any event submitting this brief and because he is not seeking oral argument, we do not press the point.

a subpoena which sought to compel his appearance on the morning of August 27 before a federal grand jury sitting in the District of Massachusetts. It was widely known that the Department of Justice was and is conducting an investigation before this grand jury with respect to the so-called "Pentagon Papers." The subpoena was served by FBI agents on the same day a lengthy article had appeared in *Boston After Dark,* a weekly newspaper, alleging that Dr. Rodberg had sought, on Senator Gravel's behalf, to arrange publication of the Pentagon Papers which, on June 29, 1971, the Senator had inserted into the Record of the Subcommittee on Public Buildings and Grounds, a subcommittee of the Senate Committee on Public Works.[3] A similar article had appeared six days earlier, August 18, in the *Washington Post.*[4]

Dr. Rodberg (and Senator Gravel, whose motion to intervene was granted by the District Court) moved to quash the subpoena on the ground, *inter alia,* that questioning him before the grand jury with respect to the matters contained in the two newspaper accounts would violate the doctrine of separation of powers and legislative privilege. In a "Memorandum of Decision and Protective Order" the District Court (Hon. W. Arthur Garrity, Jr.) denied the motion but entered a protective order pursuant to the Speech or Debate Clause limiting the scope of the inquiry.[5] Senator Gravel, as intervenor,

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[3] Burlingham, "Why M.I.T. And Harvard Suppressed The Pentagon Papers."

[4] Clawson, "Senator Gravel To Publish War Papers."

[5] *United States* v. *Doe, In re Rodberg,* 332 F.Supp. 930 (D. Mass., 1971). The protective order read as follows:

(Footnote continued on following page)

appealed the denial of the motion to quash and the government cross-appealed from the protective order.

The government also caused a grand jury subpoena to be served upon Howard Webber, director of Massachusetts Institute of Technology Press (hereinafter M.I.T. Press). Mr. Webber had been named in the *Boston After Dark* article as a person Dr. Rodberg had attempted to interest in the publication of the Pentagon Papers that Senator Gravel had earlier inserted into the Subcommittee Record. The Senator successfully intervened with respect to the Webber subpoena[6] and prayed for relief with respect to it and other subpoenas directed at third parties whom the Justice Department might want to question with respect to Senator Gravel's activities.[7] When

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(Footnote continued from preceding page)

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor about things done by the Senator in preparation for and intimately related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971, after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

[6] The motion to intervene was granted on October 24, 1971.

[7] Subsequently the Justice Department caused a subpoena to be served upon Gobin Stair, director of Beacon Press in Boston, Massachusetts. Beacon Press has published *The Senator Gravel Edition of the Pentagon Papers: The Defense Department History of Decision Making on Vietnam.*

the District Court denied further relief on October 28, 1971,[8] an immediate appeal was taken by Senator Gravel. The Senator's two appeals and the government's cross-appeal were consolidated and heard on an expedited schedule.[9]

On January 7, 1972, the Court of Appeals issued its judgment and opinion which, in essence, broadened slightly the protective order entered by the District Court but otherwise denied Senator Gravel further relief.[10] By or-

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[8] The Court did stay enforcement of the Rodberg and Webber subpoenas for ten (10) days to allow application to the appellate court for further relief. And on the following day, a supplemental protective order was entered, also for ten (10) days, prohibiting the questioning of any grand jury witness "about Senator Mike Gravel's conduct in arranging for the private publication of the Pentagon Papers nor about Dr. Leonard S. Rodberg's conduct in arranging for said publication to the extent that what he did was in his capacity as a member of the Senator's personal staff."

[9] The Court of Appeals, by order of October 29, 1971, stayed all proceedings before the grand jury. That stay was modified on November 29 when the Court of Appeals ruled "that the grand jury may pursue its inquiry into crimes relating to the so-called Pentagon Papers, provided that neither Senator Mike Gravel or any member of his staff or of the staff of the Subcommittee on Buildings and Grounds shall be subpoenaed to testify, and no witness shall be questioned concerning the acquisition, use, publication, or republication of the Pentagon Papers by Senator Mike Gravel or by any member of the staff as above defined, until further order of this Court."

[10] *United States* v. *Doe*, Nos. 71-1331, 71-1332, 71-1335 (1 Cir., 1972). The pertinent part of the judgment read:

> The orders of the District Court of October 28, 1971, are affirmed, except that the Protective Order of that date is modified to read as follows:

(Footnote continued on following page)

der and opinion dated January 18, that Court denied a petition for rehearing, although clarifying and amending in part its rulings of January 7.[11] Further, the Court amended its stay order of November 29 (see footnote 9) to conform to its opinion and judgment of January 7, as clarified on January 18. The amendment and substitution were, in turn, temporarily stayed to permit application to the Circuit Justice. Application to Mr. Justice Brennan for a stay of the mandate was duly made and on January 24, 1972, Justice Brennan granted that stay, leaving in effect the order entered by the Court

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(Footnote continued from preceding page)

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions while being interviewed for, or, after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

[11] The Court ordered that after the words "his own actions," see footnote 10, the phrase, "in the broadest sense, including observations and communications, oral or written by him, or coming to his attention," should be added.

of Appeals on November 29.[12] Senator Gravel's petition for writ of certiorari was filed in conformity with the schedule ordered by Justice Brennan. That petition (in No. 71-1017) and the government's cross-petition (in No. 71-1026) were granted on February 22, 1972, and the cases consolidated. On March 6, this Court granted the motion to expedite briefing and oral argument.

Summary of Argument

These cases lie in the mainstream of history, reflecting the struggle between the legislative and executive branches of government. This conflict, having its origins in the English struggles between the Crown and the Parliament, was of great concern to the Founding Fathers. To protect the independence and integrity of the legislature, they therefore provided in our Constitution that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

The Speech or Debate Clause has never been interpreted literally. In the first case in this Court involving the

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[12] "Upon consideration of the application of counsel for petitioner,

It is ordered that the stay of the mandate in Cases No. 71-1331, 71-1332 ordered by the United States Court of Appeals for the First Circuit dated January 18, 1972, be, and it is hereby, continued until February 10, 1972.

However, if the petition for a writ of certiorari is filed on or before February 10, 1972, the stay is to remain in effect pending disposition of the case in this Court or until further order.

Due to the shortness of time, the printing of both the petition for a writ of certiorari and the brief in opposition is not initially required."

Clause, it was held to extend to things "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881). Extending to all acts "within the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951), the constitutional provision should be "read broadly to effectuate its purposes." *United States* v. *Johnson*, 383 U.S. 169, 180 (1966). It encompasses not only the insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds, but includes as well the subsequent efforts by and on behalf of Senator Gravel to publish the Papers to make them available generally to the American citizenry. Publication of materials of public importance which have been placed in the record of Congress or one of its committees or sub-committees is a legislative activity commonly effected by many members of Congress. Such publication is in furtherance of the legislative function of informing the citizenry of facts critical to an informed view on matters of public significance.

The precedents expressly recognize that contemporary government is sufficiently complex that there must of necessity be a delegation and redelegation of governmental functions. Accordingly, the legislative privilege extends beyond legislators to those persons whose assistance is required to fulfill legislative responsibilities and prerogatives. Specifically, it includes personal aides like Dr. Leonard S. Rodberg, who act on behalf of a legislator and solely at his direction. It also extends to third parties who fulfill the same role and whose assistance is indispensable to the accomplishment of legislative functions. In the context of these cases, this would include a publisher of Senator Gravel's multi-volume copy of the

Pentagon Papers. This standard protects those personal assistants and third persons who act, in effect, as an extension of the legislator; it leaves with no immunity those who act substantially on their own and those third persons who are not essential to the legislative process.

Applied to the instant facts, the principles enunciated above mandate the conclusion that no witness before the grand jury may be questioned with respect either to the insertion of the Papers into the Subcommittee record or with respect to their subsequent publication generally. The Speech or Debate Clause acts not merely to preclude criminal prosecution but criminal inquiry in the grand jury. It extends to any action by the executive or judiciary which inhibits a vigorous and independent legislature; secret questioning of persons before the grand jury with respect to persons and matters protected by the Clause may deter vigor and independence just as much as prosecution. This Court has so concluded in the analogous First Amendment cases holding that deterrence of protected activity may be effected by investigatory interrogation, unaffected by the possibility of prosecution.

Finally, the Speech or Debate Clause bars inquiry of Senator Gravel directed at the source of his copy of the Pentagon Papers. Such protection is necessary to insure the access to facts imperative to full and free legislative debate. It must extend as well to Dr. Rodberg.

ARGUMENT

The Speech or Debate Clause Proscribes any Investigation in a Grand Jury Proceeding of Matters in the Sphere of Legitimate Legislative Activity.

A. The conflict here presented between the Executive and the Legislature is the very struggle which lead the Founding Fathers to include the Speech or Debate Clause in our Constitution.

This Court has counseled that it will "look particularly to the prophylactic purposes of the [Speech or Debate] clause," *United States* v. *Johnson*, 383 U.S. 169, 182 (1966), and "read it broadly to effectuate its purposes." *Id.* at 180. That admonition has special force in the light of the circumstances here presented. These cases involve an attempt by the executive branch of government to conduct an investigation into the obtaining by a United States Senator of a copy of the Pentagon Papers, documents which are highly critical of and a source of embarrassment to the executive branch, his insertion of those Papers into the record of a Senate Subcommittee and his efforts to publish the Papers so as to make them widely available to his constituents and to the American public generally.[13] The parallel between

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[13] The instant investigation was not commenced by a grand jury on its own. It was begun only after an Oath of Office of a government attorney was filed with the Clerk of the District Court which authorized him "to assist in presentation to the grand jury and trial of the case or cases in the District of Massachusetts in which the Department is informed that various persons have violated in the District of Massachusetts the laws relating to the retention of pub-

(Footnote continued on following page)

the facts of these cases and the historical and contemporary function of the Speech or Debate Clause is at once apparent and striking.

The present effort to question in the grand jury forum a member of the staff of a United States Senator and third parties about legislative activities raises the most profound questions going to the heart of our constitutional government. From our earliest days it has been recognized that in its own sphere each branch of government is supreme and need not, indeed must not, be held accountable to its coordinate branches with respect to activities within that sphere. In *The Federalist Papers*, No. 48, Madison wrote:

> "It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overriding influence over the others in the administration of their respective powers.

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lic property or records with intent to convert (18 U.S.C. 641), the gathering and transmitting of national defense information (18 U.S.C. 793), the concealment or removal of public records or documents (18 U.S.C. 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. 371)." A special grand jury, see 18 U.S.C. §1331, was convened as a result of the filing of this oath. The investigation before it has been conducted not by local United States attorneys, as is the case with most grand juries, but by attorneys specially assigned for purposes of this investigation to the Internal Security Division of the Justice Department.

> It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."

Madison wrote against the background of English history. The legislative privilege contained in the English Bill of Rights of 1689 "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution . . . the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States* v. *Johnson*, 383 U.S. 169, 178 (1966) (footnote omitted). See also 383 U.S. at 181.

Shortly after the enactment of our Constitution, in *Hayburn's Case;* 2 Dall. 408, 409 (1792), in one of its earliest decisions, this Court quoted the Circuit Court in that case (which had included Chief Justice John Jay): "[B]y the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and . . . it is the duty of each to abstain from, and to oppose, encroachments on either." See also *Kilbourn* v. *Thompson,* 103 U.S. 168, 190-191 (1881). This most basic principle of separation of powers finds expression in part in Article I, Section 6, Clause 1 of our Constitution, which provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

We submit that no case which has come before this or any other American court has ever posed so boldly

the threat to the interests that underlie the Speech or Debate Clause and the separation of powers that is here presented. In the long history of our Nation, this Court has had only six cases directly implicating this provision. But while those (and the analogous cases dealing with judicial and executive immunity) provide legal principles and analysis which are helpful in resolving the issues here posed, none on the facts resemble the instant case. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); and *Powell* v. *McCormack*, 395 U.S. 486 (1969), were each civil actions brought by private individuals. While a reason for enactment of the Clause was to prevent the subjection of legislators "to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader," *Tenney* v. *Brandhove*, *supra* at 377, this Court has recognized explicitly that its *primary* purpose was not to prevent private civil actions but to guard against encroachment by the other coordinate branches of government. Only six years ago, in *United States* v. *Johnson*, 383 U.S. at 180-181, this Court said:

> "[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."

Nor do *Johnson*, *supra*, or *United States* v. *Brewster*, No. 70-45 (pending) bare much similarity to the instant facts. Both involve criminal prosecutions for alleged of-

fenses unrelated to any conflict between the executive and the legislative branches.[14]

The instant matter presents the first example in American history to reach this Court of the case to which the Speech or Debate Clause was truly meant to apply. As few other disclosures ever have, the publication of the Pentagon Papers reveals that the American people have been continuously and consistently mislead by the executive branch of government with respect to American participation in the war in Southeast Asia, a discredited war now universally perceived as a national disaster. They demonstrate that the national executive misled the American people and the Congress as to the facts of the war and the true motivations behind American decision-making. The Pentagon Papers are thus a source of ultimate embarrassment to the executive branch, drawing into sharp question, as they do, its basic integrity.

The effort of the Justice Department to investigate, through the employ of a judicial proceeding, the efforts of a United States Senator and his staff to make these documents widely available to his constituents and to the American citizenry generally flies directly in the face of English and American history. It contradicts the very point of the Speech or Debate Clause and ignores the circumstances which called it into being. For as this Court has recognized, the purpose of that constitutional provision was to protect legislators who had evinced

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[14] Johnson was charged with conflict of interest and conspiracy to defraud the United States. The gravamen of the offense was that he had taken a bribe to obtain the dismissal of federal charges pending against a loan company and its officers. Similarly, Brewster has been indicted for accepting bribes in exchange for the exertion of his influence as a Senator.

criticism of the executive from harassment, intimidation or retaliation by the executive. See *United States* v. *Johnson, supra* at 178, 181-183; *Powell* v. *McCormack, supra* at 502. It was, as James Wilson wrote, explicitly intended to protect the ability of the legislator to perform his constitutional responsibilities free "from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense."[15] The "resentment" of the Executive, "however powerful" he may be, directed at the activities of a Senator who by seeking to "bare the secrets of government and inform the people," *New York Times* v. *United States,* 91 S.Ct. 2140, 2143 (1971) (Black, J., concurring) has "occasion[ed] offense" is the very thing against which the Speech or Debate Clause was meant to guard.

B. Senator Gravel's insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds and his subsequent effort to publish those Papers are matters within the sphere of legitimate Legislative activity.

We need not discuss at any length Senator Gravel's insertion of his copy of the Pentagon Papers into the record of the Subcommittee on Public Buildings and Grounds. That action (and any action preparatory thereto) is obviously "related to the due functioning of the legislative process." *United States* v. *Johnson, supra* at 172. See *Kilbourn* v. *Thompson,* 103 U.S. at 204. Congressional subcommittees and activities therein are the

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[15] 1 The Works of James Wilson (R. McCloskey ed., 1967), p. 421, quoted with the approval in *Tenney* v. *Brandhove,* 341 U.S. at 373. Wilson was an influential member of the Committee of Detail which was responsible for the inclusion of the Clause in the Constitution.

essence of the legislative process. To hold that things generally said or done in the meetings of such subcommittees, specifically the makings of oral statements and the insertion of written material into the record, are not protected, would entirely subvert the Speech or Debate Clause.[16]

Furthermore, that constitutional provision is to "be read broadly to effectuate its purposes." *United States*

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[16] In light of the government's claim that the Pentagon Papers are irrelevant to the subject matter within the jurisdiction of the Subcommittee on Public Buildings and Grounds, we would point out that the constitutional protection is not defeated by a claim of irrelevancy. Cf. *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808), quoted with approval in *Tenney* v. *Brandhove*, *supra* at 373-374. However, we must note our strong disagreement with this allegation (and with the Court of Appeals' acceptance of it). One of the prime evils of the war conducted by the United States abroad has been the effect of that war upon our nation at home. Putting to one side the moral impact of American conduct in Southeast Asia, it is widely acknowledged that the war has had a tremendous effect upon the economic status of the United States. Not only is the continuing inflation attributable in part to the war but the billions and billions of dollars expended on the war have clearly deprived domestic programs of desperately needed funds. Indeed, this very point has been made over and over again in Congressional debates over appropriations bills in the last several years. It has been one of the major factors contributing to the overwhelming opposition to the war among the American people. Since the war has played such a dominant role in the draining off of funds from domestic programs, the moral, military and political incorrectness of that war, as explicated in the Pentagon Papers, is certainly relevant to a discussion of the need and justification for greater appropriations for domestic programs. This was the very point Senator Gravel made at the outset of the Subcommittee meeting of June 29. Any claim that the continued incalculable economic costs of the war do not affect domestic economics can only be made if one ignores the plain realities of the day.

v. *Johnson, op. cit.* It cannot and has not been limited to activities such as those occurring at the June 29 meeting of the Subcommittee on Public Buildings and Grounds. That it is not to be literally interpreted was authoritatively settled in the very first case involving that provision to come to this Court. In *Kilbourn* v. *Thompson, supra* at 203-204, the Court quoted at length and with approval from the early American case of *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808), where a unanimous court said of the legislative privilege:

> "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber."

Concluding that "[i]t would be a narrow view of the constitutional provision to limit it to words spoken in debate," this Court determined that it protected all "things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204.

In the next two cases involving the Speech or Debate Clause, this Court restated the scope of that provision. In *Tenney* v. *Brandhove*, it was defined as anything "in the sphere of legitimate legislative activity." 341 U.S. at 376. In *United States* v. *Johnson*, the Clause was said to extend to all those matters that "related to the due functioning of the legislative process." 383 U.S. at 172.

We submit that the efforts by and on behalf of Senator Gravel to publish the Pentagon Papers earlier inserted into the record of the Senate Subcommittee on Public Buildings and Grounds constitutes legislative activity protected by the Constitution as defined in *Kilbourn*, *Tenney* and *Johnson*. Such a conclusion is impelled by the principles of our government and by the realities of the legislative process.

In a democratic system of government the roles of citizens and elected representatives are complementary. The latter represent the views of the former on matters of public importance. The citizen has the responsibility of informing the representative of his views. Presupposed is that the citizen is sufficiently educated about an issue so that his opinion may be an informed one. Here, the representative plays a second role—that of providing the citizen with information which will enable him to have an informed view on the subject at hand. Not only is this responsibility important in the general sense, but often times the representative may be able to provide informa-

tion to the citizenry that might otherwise be unavailable to it.

In the instant matter, Senator Gravel has sought to fulfill this informing function. He has sought to make widely available to the public information which deals with the most important issue of our time.[17] He has acted solely in his capacity as Senator,[18] seeking to inform the public of facts crucial to an informed view on the war in Southeast Asia. His actions "[i]n bar[ing] the secrets of government and inform[ing] the people," *New York Times* v. *United States, op cit.* (Black, J., concurring) surely are, therefore, "related to the due functioning of the legislative process." *United States* v. *Johnson, op. cit.*

In *Kilbourn* v. *Thompson,* the standard employed to describe constitutionally protected conduct was, as we have noted, "things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. Making available to constituents written accounts of matters of the greatest public import which have earlier been inserted into the record of Congress or a Congressional committee or subcommittee satisfies that criterion. It is commonplace for legislators to

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[17] Only parts of the so-called Pentagon Papers were previously available to the public. Various newspapers had published small excerpts in June and July, 1971. Later the New York Times published in paperback a drastically abbreviated account. The Government Printing Office has since made available (at a price of $50) a censored version of the Papers. Senator Gravel's edition, published by Beacon Press, is uncensored and available for $20.

[18] Senator Gravel derives no financial benefits from the Beacon Press publication or from the sale of that publication.

inform their constituents through written reports, speeches, etc. of matters that have arisen in the Congress and about which the citizenry should know. Some members of Congress have television shows on local stations for the purpose of discussing the issues of the day and informing the public. These activities are not at all unusual in modern legislative process.[19] For these reasons, then, Senator Gravel's efforts to publish the Pentagon Papers are protected by the Speech or Debate Clause.

The Court of Appeals conceded that publication of matters inserted into the record of Congress "may be customarily done by members of Congress . . ." (Pet. for Writ of Certiorari in No. 71-1017, p. 9A). Neverthe-

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[19] Indeed, they are even more commonplace in the executive branch. The President regularly goes on nationwide television to inform the public of a Presidential trip abroad, a new economic policy, proposed legislation to halt busing of public school children, or new "Vietnamization" plans. We doubt the executive would contend that the President's activities in informing the public in this regard of matters of public importance is not in the sphere of legitimate executive activity or not related to the due functioning of his administration or not generally done by him in relation to executive business.

Moreover, we are concerned here with information already inserted into the record of a Senate subcommittee. Certainly it cannot be suggested that the sending to constituents of material in the records of Congress is not or has not been an every day legislative activity. In fact, it is so "generally done in a session of the [Congress] by . . . its members in relation to the business before it," *Kilbourn* v. *Thompson*, *op. cit.*, that such material is mailed by virtue of the Congressional franking privilege. Publication of the Pentagon Papers through Beacon Press is no different, in terms of the Speech or Debate Clause, than publication of the Papers through invocation of the franking privilege.

less, it determined that such publication was not protected legislative activity. The Court based its conclusion on two early English cases, and the belief that the privilege has been applied beyond Congressional debate "only when necessary to prevent indirect impairment of such deliberations." *Id.*. It also relied upon a decision of the New York Court of Appeals holding that a judge had no privilege to arrange circulation of a calumnious opinion.

As to the English cases, we need only note that they no longer represent the law, having been disapproved in subsequent decisions. Compare *Rex* v. *Creevey,* 1 Maule & Selwyn 273 (1813) and *Rex* v. *Lord Abington,* 1 Esp. N.P. Cases 228 (1795), the cases cited by the Court of Appeals, with the later decisions in *Davison* v. *Duncan,* 7 E. & B. 229, 233, 119 Eng. Rep. 1233, 1234 (1857) and in *Wason* v. *Walter,* 4 L.R.Q.B. 73 (1868). *Cf. Rex* v. *Wright,* 8 T.R. 293, 101 Eng. Rep. 1396 (1799).

The claim that the constitutional provision should only apply to activities other than speech or debate when necessary to prevent indirect abridgement of speech or debate is a conclusion which begs the issue and one which suggests a return to the narrow, nearly literal interpretation of the constitutional provision which this Court has expressly rejected. *Kilbourn* v. *Thompson, supra* at 204. Moreover, it conflicts with the decision in *Kilbourn* v. *Thompson, supra* and with *Coffin* v. *Coffin, op. cit.,* and *United States* v. *Johnson, supra. Coffin* plainly envisaged what this Court expressly found in *Johnson*: that the Speech or Debate Clause "should be read broadly to effectuate its purposes." 383 U.S. at 180. And *Kilbourn* held that the act of voting, *inter alia,* was protected, an action the protection of which is not necessary to prevent indirect abridgement of pure speech or debate.

The standard adopted by the court below finds no support in the decisions of this or any other court. If a given act is "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn* v. *Thompson, op. cit.*, i.e., is "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove, op. cit.*, and is "related to the due functioning of the legislative process," *United States* v. *Johnson, op. cit.*, it should be held within the "outer perimeter," *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959), of the Speech or Debate Clause. No sound reason for a contrary conclusion suggests itself.

Finally, the decision of the New York Court of Appeals in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E.2d 257 (1943), relied upon by the court below, is readily distinguishable. The act of arranging for distribution through private channels of an allegedly defamatory opinion, the act involved there, is simply not legitimate judicial activity. The function of the judicial branch is severely circumscribed, consisting only of the resolving of "cases or controversies." The act of arranging for private distribution of a judicial opinion is unnecessary, indeed unrelated, to the performance of that function. This, in fact, was the precise basis for the New York decision. Because, as we have seen, the legislative function is considerably broader than the judicial, *Murray* adds nothing to the government's case here.

C. In order to make the Legislative Privilege meaningful, Legislative Assistants or other persons acting at the direction and on behalf of a Legislator in the sphere of legitimate Legislative activity are likewise entitled to protection under the Speech or Debate Clause.

To vigorously and successfully fulfill the responsibilities of representative government, legislators must necessarily have the assistance of staff personnel and third persons. As this Court said in *Barr* v. *Matteo*, 360 U.S. 564, 573 (1959): "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions." The complexities of modern government mandate this aid for numerous purposes: the typing and completion of correspondence with constituents, other legislators and persons in the executive branch, the drafting of speeches and of proposed legislation, the becoming familiar with the legislative proposals of others so as to be able to debate and discuss them intelligently and to cast a responsible vote. Every aspect of the legislative function merits, nay requires, this assistance. Just as judges need law clerks to help in performing the judicial function, so too legislators need help in performing the legislative function.[20] This reality is reflected in the fact that today every Senator and Representative has a personal staff, each of which plays an indispensable role. It should also be recognized that as-

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[20] Cf. *Cooper* v. *O'Connor*, 99 F.2d 135, 142 (D.C.Cir., 1938), recognizing the imperative of the delegation of governmental responsibilities. See also *United States* v. *Kovel*, 296 F.2d 918, 921 (2 Cir., 1961), where the Court of Appeals, per Judge Friendly, noted that "the complexities of modern existence" require that attorneys delegate substantial portions of their obligations to aides.

sistance comes also from third parties. For example, an expert on a given subject, such as an attorney or college professor, may be asked to draft legislation or may be consulted on a given subject. A printer may be used to print letters to constituents.

In each case, these persons, while not themselves legislators, are indispensable to the performance of legislative functions. When such persons act at the behest of a Senator or Representative "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. at 376, they must be afforded the same constitutional protection afforded the legislator. To hold otherwise would severely dilute the protection of the legislator, his ability to exercise his constitutional responsibilities. If legislative aides and others who enable the Senator or Representative to fulfill his legislative role are not protected under the Speech or Debate Clause, they will naturally be deterred in their willingness to assist the Senator or Representative. Without the assurance that in aiding the performance of "legitimate legislative activity," *Tenney* v. *Brandhove, supra* at 376, they come within the meaning and scope of the legislative privilege, such persons will not be willing to aid that performance. Since, as we have seen, such assistance is absolutely essential, the inevitable consequence will be an inability on the part of the legislator to perform his constitutional obligations. Since a legislator acts not for himself but for the people the harm is not to the individual but to representative government.

This Court has had only three cases involving the possible application of the Speech or Debate Clause to legislative aides. Nothing in any of the three indicates that such aides are not within the constitutional protection

when "acting in the sphere of legitimate legislative activity." *Tenney* v. *Brandhove, op. cit.*

Kilbourn v. *Thompson,* 103 U.S. 168 (1881), involved a suit for false imprisonment against individual Representatives and the House Sergeant-at-Arms. This Court held that the Sergeant-at-Arms was liable for damages but not the Representatives. Two points were critical in the Court's reaching this conclusion. The first is that the effort to compel Kilbourn to answer questions posed by a House Committee and to produce documents was beyond the authority of the House.[21] Thus, this Court found that the imprisonment of Kilbourn, which was the specific wrong sought to be remedied by the suit, did not constitute "legitimate legislative activity." *Tenney* v. *Brandhove, supra.* Allowing recovery against the Sergeant-at-Arms, who was the person who actually imprisoned Kilbourn, could not therefore conflict with the Speech or Debate Clause. Indeed, this Court dismissed the action against the Representatives themselves only after finding specifically that "these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him." 103 U.S. at 200. The plain implication was that they would have been held liable if they had. But the Representatives' only involve-

[21] "We are of the opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the Committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without lawful authority." *Id.* at 196. See also *id.* at 192.

ment in the affair consisted of their reporting to the House that Kilbourn had failed to comply with the committee's subpoena, offering a resolution to the House with respect to the matter and voting on that resolution, each something "generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. As the actions of each of the Representatives, unlike those of the Sergeant-at-Arms, therefore constituted "legitimate legislative activity," each was fully protected by the Speech or Debate Clause.

In *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), the Chairman and counsel of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate were sued for alleged conspiracy and concert of action with Louisiana officials to seize property and records of petitioners by unlawful means in violation of plaintiffs' Fourth Amendment rights. In reversing that part of the Court of Appeals decision which had upheld summary dismissal of the action as to the Subcommittee counsel, Sourwine, the Court specifically relied upon the petitioners' claim "that respondent Sourwine actively collaborated with counsel to the Louisiana committee in making the plans for the allegedly illegal 'raids' pursuant to the claimed authority of the Louisiana committee and on its behalf, in which petitioners claim that their property and records were seized in violation of their Fourth Amendment rights." *Id.* at 84. This activity would obviously not constitute "legitimate legislative activity," and it was on this basis that the Court decided that the plaintiffs were entitled to go to trial. Furthermore, this Court specifically held that the Speech or Debate Clause *was* applicable to legislative employees. *Id.* at 85. In fact, in concluding that Sourwine might be liable in damages, the Court specifically discounted reliance upon "that part of

petitioners' claims which related to the take-over of the records by respondents *after* the 'raids.'" *Id.* at 83-84. By so doing this Court plainly indicated its agreement with the Court of Appeals in that case that these latter allegations involved "legitimate legislative activity" and suit solely on the basis of these claims was therefore barred both as to Senator Eastland and as to Sourwine.

Finally, in *Powell* v. *McCormack*, 395 U.S. 486 (1969), this Court held that issuance of a declaratory judgment against the House Sergeant-at-Arms, Clerk and Doorkeeper that Congressman Powell had been unlawfully excluded from his House seat was not barred by the Speech or Debate Clause. This was merely an application of the rule first enunciated in *Kilbourn*: while the participation of the Representatives in excluding Powell may have constituted "legitimate legislative activity,"[22] the (threatened) actions of the employees in actually excluding Powell, as distinguished from the Representatives' acts of voting to exclude, did not constitute "legitimate legislative activity," since as the Court concluded, the House had exceeded its constitutional authority in refusing to seat Powell.

Thus even in civil contexts not involving the separation of powers considerations that lie at the heart of the Speech or Debate Clause, this Court has never indicated that a legislative aide may not be entitled to the protection of the Clause. Indeed, in *Dombrowski* v. *Eastland*,

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[22] In fact, this Court specifically left this question open. 395 U.S. at 501-502. It also left open the question whether the fact that the declaratory judgment was non-coercive relief and thus in reality no real deterrence to the vigorous performance of activities "related to the due functioning of the legislative process," *United States* v. *Johnson, supra,* removed the bar of the Speech or Debate Clause.

supra, at 85, this Court held that such persons *were* entitled to constitutional protection.[22a]

Such a conclusion is further supported by the decisions of this and lower courts dealing with the analogous executive privilege. In *Barr* v. *Matteo*, 360 U.S. 564 (1959), the Court held that an acting director of the Office of Rent Stabilization was absolutely immune from suit for alleged libel contained in a press release issued by him despite an allegation of malice. The Court relied upon the analogous decisions in *Yaselli* v. *Goff*, 12 F.2d 396 (2 Cir., 1926), *aff'd per curiam* 275 U.S. 503 (1927) and *Spalding* v. *Vilas*, 161 U.S. 483 (1896). After discussing the latter case, in which the Postmaster General was found absolutely immune from suit for activity within the scope of his authority, this Court said:

> "We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Supra* at 573.

[22a] What emerges from a careful reading of *Kilbourn*, *Tenney* and *Dombrowski* is the drawing of distinctions between legitimate and illegitimate legislative activity, rather than between legislators and legislative aides.

Contemporaneously with *Barr*, this Court held that the commander of the Boston Naval Shipyard was immune from suit for defamation for having sent copies of a report he drew up for two Navy superiors to the Congressional delegation from the State of Massachusetts. *Howard* v. *Lyons*, 360 U.S. 593 (1959). Finding that the sending of the report was in the discharge of the Commander's official duties, this Court applied the principle enunciated in *Barr* that subordinates of the Executive are likewise protected by the executive privilege. Lower federal courts have also extended protection to governmental employees. In addition to *Cooper* and *Yaselli*, *op. cit.*, see, e.g., *Bershad* v. *Wood*, 290 F.2d 714 (9 Cir., 1961), and the decisions cited in footnote 9 of *Barr* v. *Matteo*, *supra* at 572.

Certainly there is no basis for not applying *Barr*, *Howard*, *et al*, to legislative employees. It cannot be gainsaid that there must of necessity be a delegation and redelegation of responsibility in the legislative sphere, if an individual legislator is to function effectively. If, then, as this Court said, the policy behind a governmental privilege is "to aid in the effective functioning of government," *Barr* v. *Matteo*, *op. cit.*, the privilege must be applied to subordinates in the legislative branch as well as in the executive.

Dr. Rodberg is presently and has been since June 29, 1971, a staff assistant to Senator Gravel. He was engaged as such precisely for the reasons that make such persons indispensable to the legislative process—he possessed abilities and expertise beyond that of the Senator with respect to particular subject matter of public concern. He could therefore be of substantial assistance to the Senator with respect to the latter's legislative activi-

ties involving that subject matter.[23] It should be noted that the individuals protected in *Barr* and *Howard* were

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[23] Dr. Rodberg's scientific and academic credentials are extensive. See paragraphs 2 and 3 of his affidavit submitted in the District Court. It should be noted that other Congressmen have, on other occasions, availed themselves of his expertise. As Dr. Rodberg explained in paragraphs 4-6 of his affidavit:

"Since 1966, I have been sought out by a number of members of Congress for advice and suggestions concerning 'ABM, arms control, the military budget, military policy, economic conversion, how to study and evaluate military organizations and policies, United States policy in Vietnam, and new economic priorities.

In the summer of 1969, I was asked to organize a Congressional conference sponsored by more than fifty Senators and Congressmen, on Planning for New Priorities. I organized, participated in and spoke at that two day conference which was held in the Senate Office Building during June, 1969. After consultation with and under the direction of, some of these Congressmen, I secured the participation of approximately fifteen academic experts in foreign and military policies and economics. Press reports were issued on the conference by the Congressional sponsors; newsmen were present and reported on the proceedings.

On another occasion, at the request of the sponsoring Congressmen, I spoke at and participated in, and drafted the report for another Congressional conference, which report was subsequently published by the sponsoring Congressmen.

In 1969 I wrote a chapter in a book commissioned by Senator Edward Kennedy, entitled, *'ABM: An Evaluation of the Decision to Deploy an Anti-Ballistic Missle System'* (Harper and Row). Senator Kennedy wrote the introduction to this book. My chapter was entitled 'ABM Reliability'. . . .

In April, 1971 I helped to organize, participated in, spoke at and wrote the report of the Conference on Economic Conversion sponsored jointly by a number of Congressmen and public organizations. In the course of this activity I worked closely with a num-

(Footnote continued on following page)

low level governmental personnel acting on their own initiative. By contrast, Dr. Rodberg is a personal aide to Senator Gravel, accountable only to him. His actions on behalf of the Senator have been taken solely at the latter's direction. Thus, his is a much stronger case warranting the protection of a privilege. Especially is this so where the legislative privilege is embodied in the commands of a specific constitutional provision, the Speech or Debate Clause, whereas the doctrine of executive privilege is, admittedly, "of judicial making." *Barr* v. *Matteo*, *supra* at 569.[24]

Similarly, those third persons who participated in Senator Gravel's effort to publish the Pentagon Papers in-

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(Footnote continued from preceding page)

ber of aides to individual Congressmen. The report of the Conference has been published by the Coalition on National Priorities and has been distributed to members of Congress and interested members of the public.

Since 1967 I have been on the executive committee of the Federation of American Scientists (hereinafter FAS). FAS is a non-profit organization of scientists and engineers concerned with the impact of science on public affairs. As an executive committee member of FAS, I participate in developing policy positions by preparing expert analyses of issues under consideration based on my special background and access to information. In 1968, I submitted written testimony on behalf of FAS to the House Armed Services Committee. The positions taken by FAS have in the large been opposed to official administration policy. As the only member of the executive committee resident in Washington, I have discussed FAS positions and expert analyses with members of Congress, often at their request."

[24] The analogous doctrine of judicial immunity too has its roots in the common law rather than the Constitution. *Pierson* v. *Ray*, 386 U.S. 547, 553-555 (1967); *Bradley* v. *Fisher*, 13 Wall. (80 U.S.) 335 (1872).

serted into the Subcommittee record must also be protected. While not on the personal staff of the Senator, their assistance is no less indispensable. A legislator does not have the practical or financial resources necessary to publish generally a multi-volume work on American decision-making in Southeast Asia. Manifestly a publishing house is required if such an undertaking is to be fulfilled. It would make little sense to hold that the Senator has an absolute right to publish the Pentagon Papers but to then say that those whose assistance is imperative are not similarly protected. If those whose aid is essential to the performance of legitimate legislative activity are not protected they simply will not agree to help. The result would be that the Court will have provided a legislator with a right but denied him the sole means of effectuating that right.

We wish to emphasize that we are not suggesting that anything done by any employee of the legislature or of a particular legislator under color of his or her capacity as such an employee is necessarily protected by the Speech or Debate Clause in the context of a grand jury proceeding. Nor are we suggesting that anything done by third parties only tangentially related to the functioning of the legislative process is similarly protected. The constitutional immunity may be invoked by an employee only when he or she is "acting in the sphere of legitimate legislative activity," *Tenney v. Brandhove, op. cit.*, on behalf of the legislature or legislator and at the latter's direction. This readily enforceable standard narrowly restricts the immunity afforded by the Constitution yet takes cognizance of the needs and realities of the contemporary legislative process. It protects those who act, in effect, as an extension of the legislator but gives no

special status to those who, while legislative employees, act substantialy upon their own.[25]

The standard we propose with respect to third parties is likewise narrowly drawn. Only those persons "acting in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove, op. cit.*, on behalf of a legislator and at his direction and whose form of assistance is indispensable to the performance of that legislative activity, are entitled to invoke the constitutional safeguard. Again, this insures the ability of the legislator to perform his legitimate legislative functions, yet excludes the substantial number of persons who connection to constitutionally protected activity by legislators is remote or unnecessary.[26]

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[25] We note that Dr. Rodberg stated unequivocally in his affidavit that everything he has done as Senator Gravel's personal aide has been "done only after consultation with him and upon his express direction." See paragraph 7 of Rodberg affidavit.

[26] Thus a publisher acting on behalf of and at the direction of a Senator in the publication of material it is the legislator's constitutional right to publish and whose resources are required if a lengthy work is to be made generally available to the American public would be protected. A third party who, acting on his own initiative, transfers an unregistered firearm, *cf.* 26 U.S.C. §§5841-5872, to a Senator for the latter's use in considering gun control legislation would not be.

D. The Speech or Debate Clause proscribes any investigation in a Grand Jury proceeding of the insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds and the subsequent efforts by and on behalf of Senator Gravel to publish those Papers.

We submit that application of the foregoing principles leads to the conclusion that the government is precluded from questioning any witness in any respect about the activities discussed *supra*. We have heretofore established that the insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds and the subsequent efforts to publish generally the Papers placed in the record are "related to the due functioning of the legislative process." *United States v. Johnson, supra*. We have also seen that those who allegedly assisted Senator Gravel in the aforementioned efforts, particularly Dr. Rodberg, a member of the Senator's personal staff who worked only at the Senator's direction, are likewise protected by the Speech or Debate Clause. If we are correct in this regard, Senator Gravel, Dr. Rodberg and other persons who assisted Senator Gravel, would each be immune from criminal prosecution for any of their respective actions in this regard. But that is not the sole immunity that attaches: if the activities of these persons are within the ambit of the legislative privilege, not only is the government precluded from making them the subject of a criminal prosecution, it is precluded from making them the subject of a grand jury investigation. In short, they are not merely protected from prosecution, but are beyond the reach of the entire criminal process.

The Speech or Debate Clause applies to any and all actions of the executive branch (as well as those of the

judicial branch) which encroach upon the prerogatives of the legislature and which invade the independence of that deliberative body as a separate and co-equal branch of government. It is thus applicable to grand jury or other investigative proceedings initiated by the executive. The argument of the government made in both courts below (and rejected emphatically by both) that the constitutional provision does not apply unless and until an indictment is returned is entirely too narrow a view of the Clause paying scant attention to its First Amendment roots and finds no support in the decisions of this or any other court.

The fundamental interests underlying the Speech or Debate Clause and the First Amendment overlap in many respects. The Amendment is intended to protect full, robust debate upon issues of public importance. *New York Times* v. *Sullivan*, 376 U.S. 254, 269-271 (1964). The legislative privilege is designed to protect the vigorous and fearless debate of issues of public importance so necessary to those entrusted with the public responsibility for the legislative process. As James Wilson wrote:

> "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech."[27]

This Court has recognized explicitly that freedom of debate in the broad sense, the right of the legislature to exercise the rights of expression and petition which are enshrined in the First Amendment, lie at the heart of the Speech or Debate Clause. *United States* v. *Johnson, supra* at 180-182.

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[27] 1 The Works of James Wilson 421, *op. cit.*

Deterrence of a legislator's full exercise of these rights and responsibilities may be achieved by measures short of criminal prosecution. Uncontrolled interrogation of persons with respect to "legitimate legislative activity," *Tenney* v. *Brandhove, supra,* may well deter the exercise of legislative rights and responsibilities. As the Court of Appeals noted: "Intimidation of a legislator, harassment, embarrassment with the electorate, all . . . can flow from mere inquiry, [and therefore] the possibility of judicial inquiry could itself serve as an effective deterrent to speaking out against executive policy."[28]

We emphasize the confluence of the First Amendment with the Speech or Debate Clause because it is this Court's First Amendment opinions which so decisively repudiate the position urged by the government. Numerous decisions have established beyond cavil that interrogation and investigation with respect to certain subjects may effectively deter the full exercise of First Amendment rights. This abridgement of constitutional protection occurs without regard to whether or not the investigation and interrogation can or do lead to criminal charges. See, e.g., *Watkins* v. *United States,* 354 U.S. 178 (1957); *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963); *DeGregory* v. *Attorney General,* 383 U.S. 825 (1966); *cf. Caldwell* v. *United States,* 434 F.2d 1081 (9 Cir., 1970), cert. granted 402 U.S. 942 (1971). In the same way, the full exercise of legislative responsibilities can be abridged through investigation and interrogation.

Particularly is this true where the investigation occurs before a grand jury. It must be recognized that the

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[28] Pet. for Writ of Certiorari in No. 71-1017, p. 6A.

grand jury is a formidable weapon of interrogation. No one other than the grand jurors, the stenographer and the government attorneys are present with a witness.[29] What occurs before the grand jury is generally kept secret.[30] Yet the power of government to interrogate witnesses and examine them on a subject is virtually uncontrolled. The legislator would have no control over this secret, unlimited interrogation and, not being present, could only speculate, with unease, about the questions propounded to witnesses. In *In re Oliver,* 333 U.S. 257, 273 (1948), the Court spoke of "this nation's historic distrust of secret proceedings." Remembering that "[o]ne must not expect uncommon courage even in legislators," *Tenney* v. *Brandhove,* 341 U.S. at 377, it can be seen that investigating constitutionally protected legislative activity under such conditions would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr* v. *Matteo,* 360 U.S. at 571. Executive examination of "legitimate legislative activity" in the grand jury is nothing less than executive surveillance and intimidation of the legislature. This is precisely the evil against which the Speech or Debate Clause was intended to guard.

The executive's contention here is without any decisional support. In the only previous case in which the question of governmental violation of the Speech or Debate Clause in the grand jury has arisen, *United States* v. *Johnson,* 419 F.2d 56, 58 (4 Cir., 1969), the Court observed that evidence adduced before a grand jury of a speech by a Congressman was "constitutionally imper-

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[29] Rule 6(d) of the Federal Rules of Criminal Procedure.

[30] F.R. Crim. P. 6(e).

missible evidence." We have already noted the line of decisions in this Court holding that inquiry on a given subject matter in an investigatory setting may well violate analagous First Amendment freedoms.

Because all the activities in question are within "the sphere of legitimate legislative activity" and all the persons allegedly involved within the ambit of the constitutional provision, the entire matter is beyond the constitutional competence of the grand jury. Because none of the persons involved could be criminally prosecuted for the activities in question, and because the mere investigation itself necessarily inhibits vigorous legislative activity, the government simply may not inquire into the matter in the grand jury forum. And this conclusion holds without regard for whom the witness or witnesses might be whom the government wanted to question before the grand jury, even persons who did not participate in the activity and were not legislators or legislative aides of those who did: This Court has said that the Speech or Debate Clause "will be read broadly to effectuate its purposes." *United States* v. *Johnson, supra* at 180. In the context of this case, that means placing the entire subject of the insertion of the Pentagon Papers into the Subcommittee record and the publication of those Papers beyond the competence of the executive to inquire into in a grand jury proceeding. Such a result is mandated by the decisions of this Court and by the historical and contemporary function of the Clause to preserve a vigorous and independent legislature, particularly its right to expose shortcomings of the executive branch. This Court should not retreat from its steadfast protection of legislative liberty from encroachment, in whatever form or proceeding, by "an unfriendly executive," *United States* v. *Johnson, supra* at 179, "however powerful, to whom the exercise of that liberty may occasion offense." *Tenney* v. *Brandhove, supra* at 373 (quoting James Wilson).

E. Neither Senator Gravel nor Dr. Rodberg may be questioned about the source of the copy of the Pentagon Papers obtained by the Senator.

As the Court of Appeals noted, the question of whether Senator Gravel may be questioned regarding the source of his copy of the Pentagon Papers is to be distinguished from the question whether Senator Gravel or others may be subject to criminal prosecution in connection with his obtaining of that copy. We are here concerned only with the first, a matter that goes to the Senator's ability to protect his source.

Full and vigorous debate among members of Congress is to be assured, it is to be encouraged. If the Congress is to be a true "marketplace of ideas" each member must have the greatest possible information about matters of public concern. The history of United States decision-making with respect to Southeast Asia is a matter of the utmost importance. It bears directly on the current situation there and what American policy ought to be. The Papers, however, hold implications beyond the current American role in Southeast Asia. In recent years, there has been growing debate in the Congress, particularly in the Senate, that the fundamental system of checks and balances upon which our government rests threatens to become undone and that the executive branch has exceeded its authority in the area of foreign affairs. Indeed, legislation is presently under consideration which would limit the power of the President to conduct such wars as the one in Southeast Asia. The evidence in the Pentagon Papers of executive mismanagement of and deceit with respect to American policy since the close of World War II is of major importance to that ongoing discussion. No doubt there is considerable other material which is probative in that discussion as well.

Notwithstanding the importance of the Pentagon Papers and similar material to the full performance of the legislative function, allowing executive investigation in a grand jury proceeding as to who has provided Senator Gravel with the Papers will inevitably inhibit potential sources from providing similar information and discourage Congressmen from seeking it. Those who would provide such information if their identities and the attendant circumstances would be kept in confidence will no longer do so if they come to fear that that confidence cannot be kept. Such fear will be the result of acceptance of the government's position on this point. Similarly, Congressmen will be discouraged from even seeking out such sources of information if they know they cannot promise anonymity to them. We believe the conclusion of the Court of Appeals is unassailable:

> "Effective debate presupposes access to facts . . . Since the scope of the privilege should be as broad as is necessary to achieve its purpose of assuring full and free debate, see *Stockdale* v. *Hansard*, 1839, 9 Ad. & E. 2, 150, 112 Eng. Rep. 1112, 1169, we include therein inquiries which would restrict acquisition of information. It seems manifest that allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. Cf. *Caldwell* v. *United States*, 9 Cir., 1970, 434 F.2d 1081, cert. granted 402 U.S. 942."[31]

As a deterrent upon the vigorous debate envisioned by the Founding Fathers, any inquiry in a grand jury pro-

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[31] Pet. for Writ of Certiorari in No. 71-1017, p. 7A.

ceeding about the source of Senator Gravel's copy of the Pentagon Papers is proscribed by the Speech or Debate Clause.[32]

Finally, we will not repeat the discussion as to why it is necessary to protect legislative aides acting on behalf of a Senator or Representative and at his express direction. For all the reasons discussed *supra* at pp. 23-33, since the Senator cannot be questioned about his source, Dr. Rodberg cannot be either.

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[32] By citing *Caldwell* v. *United States*, *supra*, the Court of Appeals intended to analogize the right of Senator Gravel to protect his source to the right of a newsman to protect his. We believe that analogy apt and would only point out that the constitutional protection is even greater here. While the First Amendment is not absolute and the newsman's source subject to disclosure upon a showing of compelling governmental need, no balancing of interests arises under the Speech or Debate Clause: the Senator need not disclose his source under any circumstances.

CONCLUSION

For the foregoing reasons, this Court should hold (1) that no witness before the grand jury may be questioned in any respect about the insertion of Senator Gravel's copy of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds nor about the subsequent efforts to make that copy generally available to the American public, and (2) neither Senator Gravel nor Dr. Rodberg may be questioned in regard to the Senator's obtaining of that copy.

Respectfully submitted,

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Certificate of Service

This is to certify that three (3) copies of the aforegoing brief were served upon Robert Reinstein, 1715 North Broad Street, Philadelphia, Pennsylvania 19122, counsel for Hon. Mike Gravel and upon Erwin Griswold, Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for the United States, by first class mail special delivery, postage prepaid, this 12th day of April 1972.

JAMES R